IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-406

KATHLEEN M. PIETRUNTI,

*Petitioner,*

*vs.*

BOARD OF EDUCATION OF BRICK TOWNSHIP *et al.*,

*Respondents.*

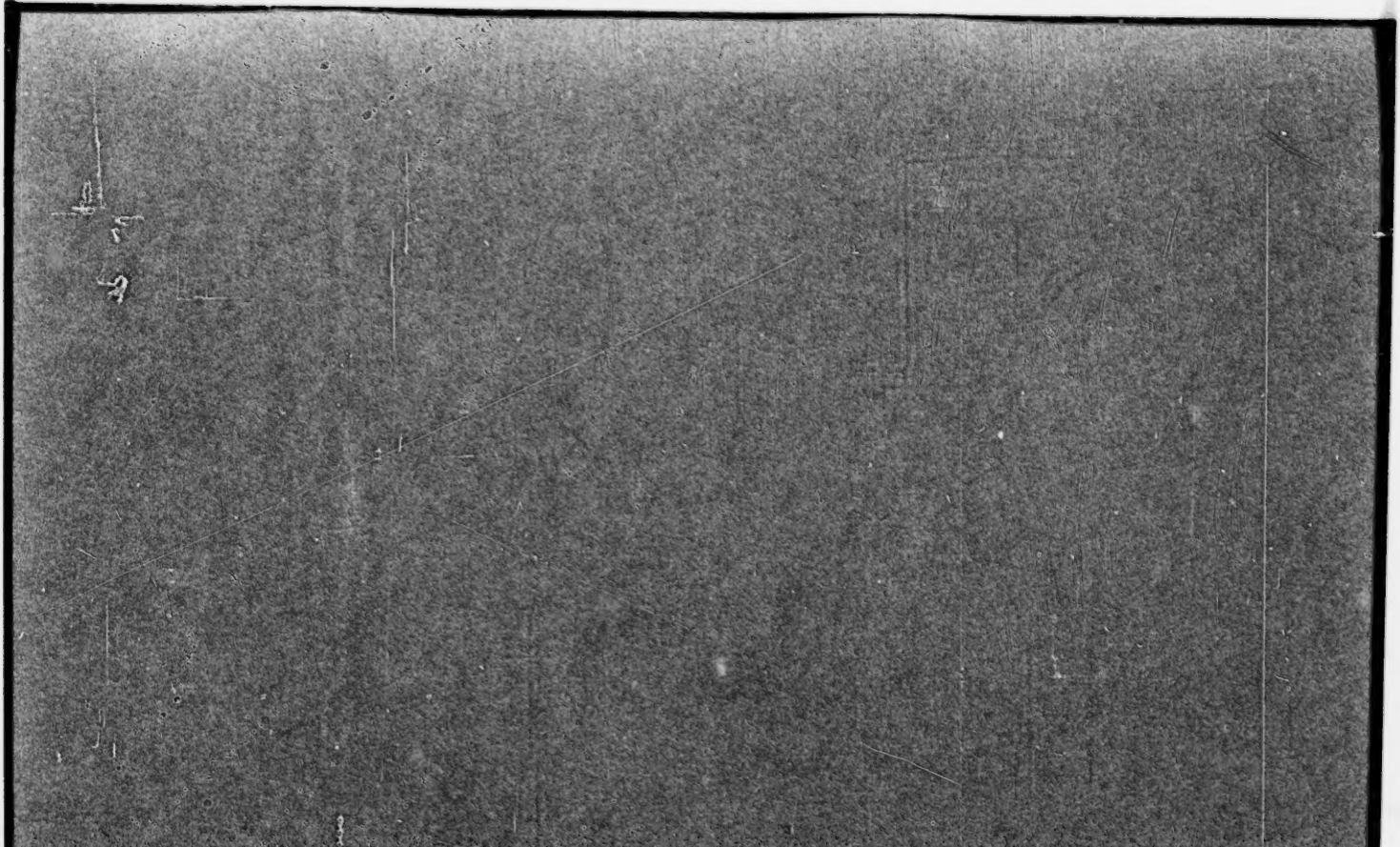
On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

## BRIEF IN OPPOSITION


WILLIAM F. HYLAND,
Attorney General of New Jersey,
*Attorney for Respondent State Board of Education*
State House Annex,
Trenton, New Jersey 08625

STEPHEN SKILLMAN,
Assistant Attorney General,
*Of Counsel and on the Brief*

JOHN SWEENEY,
Deputy Attorney General,
*On the Brief*



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IN THE

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OCTOBER TERM, 1974

**No. 74-408**

KATHLEEN M. PIETRUNTI,

*Petitioner,*

*vs.*

BOARD OF EDUCATION OF BRICK TOWNSHIP *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division**

## BRIEF IN OPPOSITION

### Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted where it appears that the action of a state agency in dismissing a teacher and the affirmance of that dismissal by a state court was substantially grounded in matters as to which

there is no claim of a denial of a federal constitutional right?

2. Did the appellate court err in considering as one of the bases of dismissal of a teacher the fact that she gave a speech at an orientation meeting for new teachers in which she directed personal and professional abusive criticism against the Superintendent of Schools?

## Counter-Statement of the Case

On September 7, 1971 respondent Brick Township Board of Education adopted pursuant to N.J.S.A. 18A:6-10 *et seq.* a resolution certifying to the State Commissioner of Education nine charges against petitioner Kathleen Pietrunti, a tenured teacher, and indicating that such charges, if proven, would warrant her dismissal. By the same resolution, the Board suspended petitioner from her teaching duties. On October 11, 1971, the Board certified to the Commissioner eleven supplemental charges against her.

After a hearing, the Commissioner found that the evidence supported several charges against petitioner sufficiently serious to warrant her dismissal. With certain exceptions noted in his decision, the Commissioner sustained the Board's charges relating to a critical speech given by petitioner in her capacity as president of the Brick Township Education Association. The Commissioner upheld the Board's charge that the speech contained untruths and distortions and also found that it constituted a derogatory personal indictment of the Superintendent of Schools which had been presented in the wrong forum and was patently unfair to him.

The Commissioner also sustained certain charges unrelated to the September 1 speech, finding charges 10(A),

10(C), and 18(D) to be the most serious. Charge 10(A) alleged that in her capacity as president of the Education Association, petitioner had improperly directed tenured teachers not to comply with any request that would make the Board's job easier, and specifically not to sign letters of intent customarily issued by the Board each spring to ascertain which teachers planned to return in the fall. Charge 10(C) asserted that petitioner had interfered with the Superintendent's administrative duties by advising teachers to send the school administration a letter prepared by the Association in place of the official letter of intent. The Commissioner, sustaining Charges 10(A) and 10(C), found petitioner guilty of insubordination, and held that her actions, if followed by a majority of teachers, could have crippled the effective operation of the schools. Charge 18(D) involved an incident in which petitioner, acting outside her role as president of the Association, called another teacher a "son of a bitch" in front of students. Despite a claim of provocation, the Commissioner found this incident evidence of conduct unbecoming a teacher. He concluded that the findings of insubordination and behavior unbecoming a teacher both in connection with the September 1 speech and in a series of other incidents warranted petitioner's dismissal.

Following this determination, an appeal was filed with the State Board of Education which on April 4, 1973 affirmed the Commissioner's decision dismissing petitioner. An appeal was then taken to the Superior Court of New Jersey, Appellate Division, which affirmed the State Board's decision in a per curiam opinion rendered on April 23, 1974.* In that decision the state appellate

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* Petitioner has failed to name the State Board of Education as a respondent. It is assumed that this omission was accidental since the State Board was a named respondent in the state courts and appropriate service has been made by petitioner upon the Attorney General of New Jersey as counsel for the State Board.

*(Footnote continued on following page)*

court concluded that the record supported the Commissioner's findings and his conclusion that petitioner had behaved in a manner unbecoming a teacher and not protected by the First Amendment. In particular, the Appellate Division found that petitioner had sought to undermine the authority of her superiors, by interfering with their established procedures in circulating alternative questionnaires concerning continuing employment and advising other teachers to refuse to cooperate with the local board in any way, that she had spoken out in a place and in a manner which could only throw into question her own professionalism and commitment to the furtherance of the educational process in her school district, and that she had attacked a superior with whom she would be expected to have further professional contact both as a teacher and as president of the teachers' Association, thus undermining a professional relationship, doing so in an inappropriate public forum rather than pursuing available grievance procedures.

On July 22, 1974 the New Jersey Supreme Court denied petitioner's petition for certification. Pietrunti filed her petition for writ of certiorari on October 10, 1974.

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*(Footnote continued from preceding page)*

It is New Jersey law that where an appeal is taken from the quasi-judicial decision of a state agency, that agency is a party to the appeal. Pressler, Current N. J. Court Rules R. 2:5-1(e) and Comment thereon Rule 21(4) requires that all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court.

## *ARGUMENT*

## POINT I

**The court should not grant a writ of certiorari because the state court's decision was substantially grounded in matters as to which there is no claim of protection under the First Amendment.**

It is well established that the court only has jurisdiction to review the judgment of a state court where the record shows that a federal question was raised, and that it was decided adversely to the petitioner. The record must also show that the federal question was necessarily involved in the decision, and that the state court could not have given a judgment without deciding it. If that judgment can be sustained on other than federal grounds the Court will not revise it, even though a federal question may also have been decided, and even though that question may have been decided incorrectly. *Williams* v. *Kaiser,* 323 U.S. 471, 477-478 (1945); *Smith* v. *Adsit,* 83 U.S. 185, 189 (1873).

In the instant case, twenty charges against petitioner were certified to the Commissioner by the local school board pursuant to N.J.S.A. 18A:6-10, which lists as grounds for proper dismissal of a teacher inefficiency, incapacity, unbecoming conduct or other just cause. The Commissioner concluded that portions of three charges and five other charges in their entirety should be dismissed. He considered the remaining items in two categories, those arising out of a series of incidents involving petitioner's behavior as a teacher in Brick Township (98a-100a), and those relating to the September 1 speech given by petitioner at the orientation meeting for new teachers (95a-97a). It is apparent from the language of the Com-

missioner's decision that he divided his consideration of the charges in this manner for practical reasons, to deal with all charges arising out of the same fact situation together, but that his final decision to dismiss petitioner was based on her general pattern of insubordinate and unbecoming behavior as illustrated by each of the charges sustained.

The Commissioner found evidence of insubordination in petitioner's urging members of the teachers' association of which she was president not to comply with any request that would make the local board's job any easier, and specifically not to sign the annual letter of intent. The Commissioner noted that if this recommendation had been followed by a majority of the teachers it ". . . could have seriously crippled the effective operation of the Brick Township Schools . . ." (98a). The Commissioner found further evidence of behavior unbecoming a teacher in petitioner's decision to address a fellow teacher as a "son of a bitch" in front of students. The Commissioner also found evidence of unbecoming conduct in petitioner's orientation day speech, terming it a derogatory personal indictment of the superintendent presented inappropriately in the wrong forum and patently unfair to him. Finally, the Commissioner concluded that, viewing the entire pattern of conduct set forth in the record, together with other proven examples of inappropriate behavior, petitioner had exhibited continuing insubordination and other forms of conduct unbecoming a teacher, inconsistent with her own effectiveness in the school system and in turn with effective education in that system.

In affirming the Commissioner's decision the appellate court relied on a similar range of evidence of petitioner's unbecoming behavior, noting that while the orientation speech in itself was sufficient to warrant petitioner's dis-

missal, the other charges sustained by the Commissioner unrelated to that speech supported the basic conclusion that petitioner was unfit to continue as a teacher. The court placed particular emphasis on the insubordination shown by petitioner's advice to association members not to cooperate with the local board in any way and on the inappropriate conduct evidenced by a series of incidents involving "brusque" language and behavior upon which the Commissioner had also relied as evidence of a pattern of unbecoming behavior (16a-17a). The appellate court also found petitioner's orientation day speech to be an insulting and vituperative attack on the character of her superiors unprotected by the First Amendment. The court concluded that the Commissioner's findings and conclusions were substantially supported by the record and affirmed.

A review of both the Commissioner's decision and the court opinion affirming it reveals that while a federal constitutional question was raised and considered in connection with some of the charges against petitioner, her dismissal was also based in substantial part upon charges unrelated to the federal question raised. While concluding that petitioner's dismissal could have been justified on the basis of her speech alone, the appellate court gave substantial weight in its opinion to evidence of a pattern of behavior considered unbecoming conduct for a teacher, unrelated to the September 1 speech. In view of the emphasis placed in the appellate court decision, it appears that even if petitioner had never given that speech her dismissal could still have been upheld on the basis of her general and consistent pattern of unbecoming conduct.

In the absence of any clear showing that the state appellate court relied only or primarily on federal grounds for its decision, it is respectfully submitted that this case

does not provide an appropriate context in which to consider the federal constitutional questions which petitioner has attempted to project for the Court's discretionary review.

## POINT II

**The petition for writ of certiorari should be denied because the state court has correctly applied federal constitutional standards in concluding that irresponsible and inflammatory speech personally critical of a superior falls outside the protection of the First Amendment and is a proper basis for discharge of a public employee.**

Although teachers may not be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens because of their occupation, their right to speak is not unlimited. In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the Court clearly indicated that the State's interest as an employer in regulating the speech of its employees exceeds its interest in regulating the speech of its citizens in general. *Id.* at 568. The problem, the Court observed:

> ". . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

While the Court in *Pickering* provided "some of the general lines" to be followed in balancing these competing interests, it refrained from establishing a general standard applicable to all such expression cases "(b)ecause of the

enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superior, against whom the statements are directed, to furnish grounds for dismissal . . .". *Id.* at 569.

The specific facts of the case were critical to the determination in *Pickering,* and should therefore be briefly reviewed here. Pickering, a high school teacher, had been discharged for writing a letter to a local newspaper which criticized the school board and it superintendent of schools for their allocation of school funds between education and athletic programs and for the manner in which they had informed the district's taxpayers of the reasons why additional tax revenues were being sought. *Id.* at 569. His letter was a response to earlier letters to the newspaper by the superintendent of schools and a group of teachers. *Id.* at 566. The letter, factually untrue in certain respects, had been sent soon after voter defeat of a proposed increase in school taxes (391 U.S. at 571), and addressed issues then currently the subject of public attention (391 U.S. at 572) and ultimately determinable at the polls. *Id.* at 566-7. The Court concluded that in that factual context a teacher may not be discharged from public employment because of the exercise of his right to speak to the voters on issues of public importance, in the absence of proof of false statements knowingly or recklessly made by him. *Id.* at 574.

However, the opinion should not be read to establish a broad immunity applicable to all critical statements by teachers. The *Pickering* court suggested that the outcome might be different where such statements are directed towards a person with whom an employee would normally be in contact in his daily work (391 U.S. at 569-70 and n. 3), where critical public statements are made by an

employee in a position involving a great need for confidentiality (391 U.S. at 570 n. 3) or where an employee speaks publicly before submitting complaints about school operations to his superiors pursuant to an established grievance procedure. *Id.* at 572 n. 4. In addition, the Court inferred that dismissal might be permissible in cases involving false statements that were particularly difficult to rebut (391 U.S. at 572) or in situations where erroneous public statements are shown or can be presumed to have either interfered with the teacher's classroom duties or to have interfered with school operations generally. *Id.* at 572-73.

*Pickering* indicates that in analyzing the First Amendment rights of a public employee speaking as a citizen the subject matter of the speech, the manner and occasion for its delivery and the interests the speech advances are important considerations. *See e.g. Clark* v. *Holmes,* 474 F. 2d 928, 931 (7th Cir. 1972) *cert. den.* 411 U.S. 972 (1973). In particular, a school board has a legitimate interest as an employer in preventing its employees from engaging in inflammatory rhetoric personally critical of a superior. *See e.g. Duke* v. *North Texas State University,* 469 F. 2d 829 (5th Cir. 1972), *cert. den.* 412 U.S. 932 (1973). In sum, in balancing the interests of the teacher and his employer as required in *Pickering,* weight must be given to the time, place, and in fact total circumstances under which the teacher's challenged speech occurred.

In affirming the State Board of Education's decision, the state appellate court applied the guidelines developed in *Pickering* and subsequent federal cases, and concluded that petitioner's behavior was clearly distinguishable in its timing, the manner of its delivery, the position of the person speaking and of the persons spoken to, the nature of the subjects spoken about, and the apparent effect of the speech upon continuing professional relationships,

particularly when viewed in the context of petitioner's continued pattern of insubordinate and unbecoming behavior set forth in Point I of this brief. Such behavior is clearly not protected by the First Amendment, and is an appropriate basis for a teacher's dismissal.

## CONCLUSION

For all of the foregoing reasons it is respectfully submitted that Pietrunti's petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of the State of
New Jersey
*Attorney for Respondent*
*State Board of Education*